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Supreme Court of the United States

OCTOBER TERM, 1941

No. 857

Denied
3154.S.805

SIMON DURLACHER, *Petitioner*,

v.

HELEN S. DURLACHER, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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January 9, 1942.

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No.

SIMON DURLACHER, *Petitioner,*

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HELEN S. DURLACHER, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Simon Durlacher prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered on the 28th day of October, 1941, reversing the judgment of the United States District Court for the District of Nevada which denied to the respondent recovery of certain sums of separate maintenance money, and remanding the case with directions to the trial court to enter judgment for the respondent in the full amount of the separate maintenance money judgments sued upon.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 74, 79) is reported in 123 F. (2d) 70 (Adv.). It was amended upon petition for re-hearing Dec. 10, 1941 (R. 81). The opinion of the United States District Court is reported in 35 Fed. Supp. at p. 1005.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 28, 1941 (R. 89). Petition for rehearing was denied December 10, 1941. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. Sec. 347 (a) and Rule 38 of the Revised Rules of this Court, in particular subdivision 5 (b) of said Rule 38.

SUMMARY STATEMENT OF THE CASE.

The petitioner and respondent were married in the City of New York, State of New York, on May 16, 1932, and during all the time that they lived together as husband and wife, their matrimonial domicil was in the City and State of New York (R. 20). On February 7, 1934, a decree of separation and maintenance between the petitioner and respondent was made and entered by the Supreme Court of the State of New York, in and for the County of New York, by the terms of which decree the respondent herein was granted a separation from the bed and board of the petitioner forever by reason of the abandonment of the respondent by the petitioner and by the terms of which decree the petitioner was ordered to pay to the respondent as separate maintenance the sum of $833.33 per month, beginning on October 1, 1934 (R. 20, 21). This separation and maintenance decree was granted after personal service upon the petitioner within the State of New York and after general appearance by him in the suit (R. 25).

On or about January 15, 1939 the petitioner completely abandoned his residence and business in the State of New York and moved to Reno, Nevada, with a bona fide intention to remain there indefinitely (R. 21). This permanent residence in Reno was established January 27, 1939 and on that date became and has ever since remained the bona fide domicil of the petitioner (R. 21).

On April 14, 1939 the petitioner obtained a decree of divorce from respondent in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the ground provided for in the Nevada statutes, that petitioner and respondent had not lived together as man and wife during the preceding three years (R. 19, 21). In that suit the respondent was served personally with process within the State of New York but not within the State of Nevada, and she did not appear generally or specially in said suit (R. 26, 27). This decree of divorce is conceded and stipulated to be a valid, binding and effective decree within the State of Nevada and to have been entered without fraud on the part of the petitioner (R. 22). The petitioner had between the entry of the separation decree on February 7, 1934 and January 1, 1940, in part "for purely personal reasons" paid the respondent the separate maintenance allowance provided for in said separation decree, in the amount of $833.33 per month (R. 22, 23). After January 1, 1940 the petitioner declined to make further payments of separate maintenance and the respondent caused judgments to be entered against the petitioner in the New York Supreme Court in the amount of $833.33 with costs on February 26, 1940 (R. 5, 6), and the amount of $833.33 with costs on March 16, 1940 (R. 6, 7), and in the amount of $1,666.66 on April 24, 1940 (R. 8, 9). All of these money judgments were entered without any further service of process upon the petitioner within the State of New York and without a general appearance by the petitioner there and with a special appearance by him to contest the jurisdiction only in the first two proceedings which resulted in the entry of the two judgments for $833.33 each and costs.

On or about June 8, 1940, the case at bar was instituted by the respondent who sued the petitioner in the District Court of the United States for the District of Nevada, to collect with interest the sum of $3,365.72, being the total amount of the three above-mentioned judgments with costs which had been entered against the petitioner in New York

State as above stated (R. 3). In this action, the petitioner was served personally within the State of Nevada and appeared generally in the case and answered and defended it (R. 9). A judgment was entered January 11, 1941, by said District Court of the United States for the District of Nevada in favor of the respondent concerning the two judgments for $833.33 each and costs on the ground that because of the respondent's special appearance in those proceedings in the New York Supreme Court, the judgments became res judicata in Nevada; but the District Court entered judgment in favor of the petitioner with regard to the New York judgment for $1,666.66 on the ground that the Nevada divorce decree dissolved the marital relation and hence terminated the legal effect of the prior New York separate maintenance decree. (R. 51, 52, 57, 58; 35 F. Supp. 1005.)

No cross appeal was taken by the petitioner from that part of the above-mentioned judgment entered against him, with the result that there is no question before this Court of the propriety of the judgment thus entered against the petitioner on the ground of his special appearance in the proceedings in the New York Supreme Court. An appeal to the Circuit Court of Appeals for the Ninth Circuit was taken by the respondent from that portion of the judgment of the District Court which decided in favor of the petitioner in the amount of $1,666.66 (R. 58, 59). The Circuit Court of Appeals entered its judgment on October 28, 1941, reversing with costs the judgment of the District Court in so far as it had decreed for the petitioner in the amount of $1,666.66 and remanding the case to the District Court with instructions that the $1,666.66 be included in the judgment against the petitioner (R. 80). Petition for rehearing was filed by the petitioner in the Circuit Court of Appeals, which was denied (R. 82). No opinion upon this denial of the petition for rehearing was filed by the Circuit Court of Appeals but it did then enter an order dated December 10, 1941, amending its opinion filed October 28, 1941, by the substitution of the matter contained in its order of December 10, 1941 (R. 79, 81, 82).

SPECIFICATION OF ERRORS TO BE URGED.

1. The court below erred in holding that the New York judgment of April 24, 1940, for $1,666.66 separate maintenance money was enforceable in Nevada and must be enforced by the United States District Court for the District of Nevada, notwithstanding that the marriage of respondent to petitioner had theretofore been dissolved by a final, valid judgment of absolute divorce rendered by a Nevada court of competent jurisdiction and that all sums of money due the respondent under the separation decree prior to said divorce had been fully paid.

2. The court below erred in refusing to hold that the Nevada decree dissolving the marriage between the parties to the case at bar and terminating their marital status, superseded and terminated the liability of the petitioner to pay further sums of moneys to the respondent for her separate maintenance as his wife.

3. The court below erred in refusing to direct the trial court to give full faith and credit to the Nevada decree divorcing the parties herein, and in requiring the trial court to enforce the New York decree for separate maintenance of the respondent as the wife of petitioner.

4. The court below erred in refusing to apply in the case at bar the applicable law of the forum in which the case was tried, and in refusing to give effect to the laws and judicial decisions of the State of Nevada.

5. The court below erred in reversing the judgment of the trial court and in remanding the case with directions to enter judgment for the respondent for the full amount of the New York judgments sued upon.

QUESTION OF LAW PRESENTED.

Only a single question of law is presented in this appeal if certiorari is granted, that is, whether the Court below erred in not applying the Nevada case law that a valid Nevada divorce decree had destroyed the marriage status of the parties and had rendered nugatory a previous New York decree for separation and maintenance and a New York money judgment based thereon WHEN SUIT WAS BROUGHT UPON THAT MONEY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First. The case presents a constitutional law and conflict of laws question of general importance.

Second. There is an apparent conflict on principle between the judgment and opinion of the Circuit Court of Appeals for the Ninth Circuit herein and judgments and opinions of the Court of Appeals for the District of Columbia concerning the construction and application of the Constitution and a Statute of the United States.

Third. The judgment and opinion of the Circuit Court of Appeals herein fail to apply previous decisions of this Court which should control.

WHEREFORE, the petitioner respectfully prays the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the record in said cause may be removed into this Honorable Court and that the errors complained of may be examined and corrected and said judgment reversed.

Respectfully submitted,

HAMILTON VREELAND, JR., AND

SAMUEL PLATT,
Counsel for Petitioner.